STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 5, 2020)

KATHERINE BUNNELL,	:	
	:	
Petitioner,	:	
	:	
VS.	:	**C.A. No. PM-2012-4062**
	:	**(P1-2005-0161A)**
STATE OF RHODE ISLAND,	:	
	:	
Respondent.	:	

DECISION

LANPHEAR, J. Before this Court is Katherine Bunnell's Application for Post-Conviction Relief pursuant to G.L. 1956 § 10-9.1-1. For the reasons set forth herein, this Court denies Bunnell's Application for Post-Conviction Relief.

I

Facts and Travel

A

Underlying Facts[1]

On October 29, 2004, Bunnell and Gilbert Delestre left their two children and Bunnell's three nephews at their apartment with a fifteen-year-old babysitter. *Bunnell*, 47 A.3d at 222; Trial Tr. vol. II, 184-86. They left at about 7 p.m. and agreed to return by 11:30 p.m. *Bunnell*, 47 A.3d at 222; Trial Tr. vol. II, 183-84. As one of the children, three-year-old TJ, was having difficulty sleeping, the babysitter let him lie down on the couch, as she lied down on the floor next to him. *Bunnell*, 47 A.3d at 222. She was awakened when Bunnell and Delestre returned at 2:30 a.m. the

[1] These facts are primarily drawn from *State v. Bunnell*, 47 A.3d 220 (R.I. 2012).

next morning, with Bunnell screaming obscenities concerning spilled milk and food. *Id.* After the babysitter noted that TJ had been on the couch, Delestre went upstairs and the babysitter heard three or four slaps followed by TJ crying. *Id.* Bunnell then went upstairs, returning downstairs carrying TJ by his arms, repeatedly striking TJ with her knee as he dangled in front of her. *Id.* at 222-23. Bunnell then dropped him to the ground, and TJ landed on his stomach and hit the side of his face on the floor. *Id.* at 223. Bunnell then pulled TJ toward the mess, dropping him and hitting him in the back and chest several times with a closed fist. *Id.* While TJ lay on the floor after falling a third time, Bunnell took TJ's wrist, holding his head just off the floor and slapped him back and forth across his face four times so that the opposite side of his face hit the floor with each strike. *Id.*

Bunnell then yanked TJ toward a closet, letting him fall backwards and hitting his head on the closet door, where Bunnell slapped TJ again and poured milk over him as he cried. *Id.*; Trial Tr. vol. II, 242-46. After Bunnell offered to drive the babysitter home, the babysitter turned to see TJ in midair as if thrown by Delestre. *Bunnell*, 47 A.3d at 223. TJ landed on his stomach with his left leg twisted underneath him. *Id.* at 224; Trial Tr. vol. II, 258. Bunnell picked TJ up and, when looking for her keys, carried him over to the stairs. *Bunnell*, 47 A.3d at 224. Delestre then picked TJ up, brought him up two stairs, and then placed him back down. *Id.* Bunnell then drove the babysitter home.[2] *Id.*

After a 911 dispatch call,[3] the Woonsocket Fire Department arrived at Bunnell's apartment at 3:31 a.m. *Id.* A lieutenant present noticed "traumatic injuries" and blood and vomit around

[2] Our high court drew this version of events from the babysitter's testimony. *Id.* at 221-24.
[3] The 911 call was made by Delestre's cousin who had earlier been out with Delestre and Bunnell. The cousin returned to the house to get his phone and jacket and saw the young boy limp in Bunnell's arms, causing him to call an ambulance. *State v. Delestre*, 35 A.3d 886, 890 (R.I. 2012);

TJ's mouth. *Id.* The lieutenant also noticed bruising and swelling around TJ's eye and on his head. *Id.* Woonsocket police officers then spoke with Bunnell, Delestre, and Delestre's cousin about what happened. Trial Tr. vol. I, 57-59. At that time, Bunnell told an officer that she and Delestre returned home from a club and she waited in her car for the babysitter to come out so that she could bring the babysitter home. *Id.* at 60-63, 104-06, 113, 124-25, 130, 136. Bunnell also stated that while she was bringing the babysitter home, Delestre discovered TJ in his bed, not breathing. Trial Tr. vol. I, 62, 106, 113, 136.

The next morning, Bunnell was interviewed by police again. Trial Tr. vol. VI, 891-92. At that time, she admitted to smacking TJ in the face several times to discipline him but stated that Delestre was "pushing and throwing" TJ "around" and repeatedly hit TJ in the face. Trial Tr. vol. III, 478; vol. VI, 892, 896. Bunnell again stated that she brought the babysitter home, but this time said that when she returned, she found TJ in his bed, unresponsive. Trial Tr. vol. III, 478-79. She believed TJ to be dead but attempted to put cold water on his face to revive him. *Id.* at 479. The police then interviewed the babysitter and noticed inconsistencies between her statements and those given by Bunnell. *Id.* at 484-88. That same day, police interviewed Bunnell a third time to confront her about these inconsistencies. *Id.* During this interview, Bunnell admitted to hitting TJ while she was upstairs with him but denied bringing him down the stairs and throwing him on the floor. *Id.* at 489. Bunnell also admitted to slapping TJ in the face several times once downstairs and also to pouring milk on his head.[4] *Id.* at 490.

Trial Tr. vol. V, 724-29. The cousin grabbed TJ and gave him CPR until emergency personnel arrived. Trial Tr. 738-40, 751-52.

[4] At trial, Bunnell's testimony was consistent with this final interview she had with the police. Trial Tr. vol. VI, 892-933.

The night of the incident, TJ was transported to Hasbro Children's Hospital where a CAT scan showed that there was a large subdural hematoma or hemorrhage on the left side of TJ's brain and the brain had significant swelling. *Bunnell*, 47 A.3d at 225. On October 31, 2004, an MRI revealed cell or tissue death in the brain. *Id.* That day, TJ was pronounced brain dead and was taken off life support. *Id.*

Dr. Dorota K. Latuszynski performed TJ's autopsy.[5] *Id.* The autopsy revealed "multiple blunt traumatic injuries of the head, including injuries on the left cheek, the left ear, the temple area, the right ear, as well as injuries present on the forehead." *Id.* TJ also had bruising on his forehead, eye, cheekbone, and around his ear. *Id.* He had a large patterned injury on his left cheek that was consistent with being slapped. *Id.* There was also significant injury to TJ's lips and tongue which were considered significant because:

> "a considerable amount of force needed to be applied to TJ in order for that to happen. We do see bite marks in some other types of deaths, . . . [but] we don't see the extent of hemorrhaging bite marks that were seen in this case. I think this was probably one of the worst ones I've seen as far as bite marks go." *Id.* at 226.

In addition, TJ suffered from "subgaleal hemorrhag[ing]" on the top and sides of his head due to blunt-force trauma. *Id.* TJ's brain also had "'a large left-sided subdural hematoma' and 'a slight shift of the structures of the brain from the left side to the right side.'" *Id.* The brain also had bruising and swelling. *Id.*

TJ also had "acute compression fractures" on his vertebrae which are consistent with "'application of some sort of blunt-force trauma . . . to the top of [his] head' or 'a fall where someone lands directly on their feet or their buttocks[, such that there is] an up and down type of application of force.'" *Id.* Dr. Gillespie testified that he believed "the totality of the injuries

[5] Dr. Peter A. Gillespie testified as to the findings of the autopsy because Dr. Latuszynski was on medical leave. *Id.* at n.7.

inflicted on [TJ] . . . led to his death." *Id.* Dr. Gillespie also testified that he believed the injuries TJ sustained were consistent with the babysitter's description of the events. Trial Tr. vol. IV, 593, 597-99.

B

Findings of Fact from the Post-Conviction Relief Hearing

Gerard Donley had been a trial attorney with a focus on criminal litigation for over twenty-five years by the time of the Bunnell trial. He had handled dozens of felony trials and at least ten murder trials. By court-appointment in November 2004, Mr. Donley represented Bunnell on the charge of murder. Approximately a year before the trial, he had planned to move to Italy with his wife. The trial was delayed several times, so he postponed his travels until the jury returned its verdict. By then, he had ensured that Bunnell had substitute counsel. As a court-appointed attorney, he was able to apply to the Court for the payments of expenses, such as an expert witness. Upon entering the case, Mr. Donley commenced his review of the police reports, discussed the case with Bunnell, and spent considerable time on research, particularly in an effort to have the charge amended to manslaughter, and to consider the law regarding conspiracy. He represented Bunnell at a multiple-day bail hearing that was held jointly for Delestre and Bunnell. Mr. Donley had the recordings of the Grand Jury proceedings and the bail hearing transcript available to review.

Prior to the trial, the defense theory of the case was that Bunnell had slapped TJ, but he was still alive and conscious when Bunnell left to take the babysitter home. Hence, defense would claim that the slaps did not cause the death. After some research, Mr. Donley located Dr. Arden as a potential witness. Mr. Donley contacted Dr. Arden in May 2007 and determined Dr. Arden could testify in July. Oddly, Mr. Donley never followed up by retaining Dr. Arden or forwarding

him the medical records. Mr. Donley concluded, from his medical and legal review, that an expert would not have foundation to determine which defendant caused the death and began to change his theory of how to present the defense.

Mr. Donley also believed that Dr. Latuszynski, the medical examiner who testified at the bail hearing, could not easily be attacked, and at the bail hearing inferred that TJ died from the cumulative effect of multiple blows. He believed that Dr. Latuszynski was impartial, and Mr. Donley could work with her testimony at trial.

At the murder trial for Bunnell, the state brought in another medical examiner, Dr. Gillespie, to substitute for Dr. Latuszynski. Mr. Donley does not fault himself for failing to object to Dr. Gillespie, he believed that any variation of Dr. Gillespie's testimony from Dr. Latuszynski's autopsy could be undone on cross-examination, after all it was another doctor's case. At trial, Dr. Gillespie testified that the fall down the stairs may have caused the different injuries. Dr. Gillespie also said Bunnell's slaps could have been fatal. Dr. Gillespie, unlike Dr. Latuszynski, did not believe that TJ would have necessarily become unconscious immediately after the fatal blow. To further impugn Delestre, Mr. Donley sought the introduction of Delestre's inconsistent statements about the child's fall.

At the post-conviction trial, Mr. Donley found his decision not to focus on an independent pathologist to be well-founded. He decided "not to . . . chase shadows." Hr'g Tr. 17, Oct. 28, 2016. Instead, he focused on the extensive testimony he had received from the bail hearing and the babysitter's testimony. Mr. Donley never thought it would be possible to establish "a particular identifiable singular injury that was overwhelmingly responsible." *Id.* at 21. Mr. Donley's practice was not to "chase what [he] didn't think would be a fruitful avenue." *Id.* at 22. Mr. Donley also testified "criminal liability law that I understood at the time led me to conclude that

some distinction between the parties' acts or what injuries were inflicted . . . weren't necessarily going to lead to any legal benefit." *Id.* at 28. "I accepted the fact that they were going to be --they were going to be deemed as acting in concert . . . you can't fight what I think is inevitable." *Id.* at 32. It "just didn't seem that either the [medical] evidence that was open for review or the alleged conduct and the law combined was such that . . . it wasn't going to be fruitful." *Id.* at 33.

Instead, Mr. Donley testified that he focused his trial efforts on the testimony of the babysitter. Mr. Donley found that she had altered her version of the events, and her testimony would be key to establishing the significant facts in the case. He had mapped out her inconsistencies and was prepared to establish that she had been pressured from various state agencies. He also spent days in preparing Bunnell to testify and discussing whether she should testify.

Over two years later, Dr. Arden was called by Bunnell to testify at the post-conviction trial.[6] Dr. Arden is a medical doctor with experience in forensic pathology. He has served as a medical examiner in four different jurisdictions, including five years as the Chief Medical Examiner for Washington, D.C. He has been board certified in anatomic and forensic pathology since 1985. He has taught, published, performed over 3000 autopsies, and testified over 900 times. He described a "special interest" in pediatric forensic pathology. Hr'g Tr. 14-15, Apr. 10, 2019.

Dr. Arden reviewed the evidence at the murder trial, the testimony, and the extensive medical reports. He prepared an independent report. Pl.'s Ex. 4. He focused on two issues: what injuries caused the death and the timing of TJ's injuries. He disagreed with the medical examiner's finding that the cause of death was multiple blunt impact injuries including those to his left femur

[6] Although the Court notes these points to establish Dr. Arden's theories advanced at the post-conviction trial, the Court does not adopt Dr. Arden's factual predicate for reasons set forth in this Decision.

and head. Hr'g Tr. 24, Apr. 10, 2019. He claimed the state medical examiner was unable to distinguish from the multiple impacts. *Id.* Dr. Arden concluded that Delestre struck the child in the head when Bunnell had left. *Id.* at 37-38. This incident caused the child to fall and flip down a half-flight of stairs, and the child was not awake or conscious thereafter. *Id.* He testified that the fracture of the femur in TJ's thigh would have caused extreme pain and prevented him from standing. *Id.* at 41-44. Dr. Arden concluded that the fracture to the left femur did not contribute or cause the death, while the head trauma did, and found those injuries could be distinguished. *Id.* at 25. In his opinion, the head trauma caused the contusion and subdural hemorrhage (bleeding outside of the brain but inside the skull and dura) and would have caused rapid loss of consciousness. *Id.* at 35-36.

Dr. Chirkov was working as a medical examiner in the Rhode Island Medical Examiner's office during TJ's autopsy. He was familiar with the case at the time. He agreed with the cause of death being multiple blunt-force trauma to the head, torso, and upper and lower extremities, but his office could not distinguish between the causes and considered the whole panoply of injuries together. No physical injury sufficiently described the order of the injuries. Dr. Chirkov determined that he could not conclude that one injury caused the death when TJ suffered from contrecoup (the brain moving harmfully within the skull), brain edema (evidenced by the vomit on the child's clothing), and ten impacts to the head (evidenced by use of photographs of TJ). Describing forces of energy, and using the x-rays, Dr. Chirkov established that significant force perpendicular to the bone would have been needed for the femur fracture. *Id.* at 130. He established that the banging of TJ's head multiple times resulted in contrecoup, the brain shifting within the skull. This resulted in brain edema and swelling of the brain. The accumulation of the blood from brain edema, as well as TJ's many other injuries, resulted in TJ's death.

The theories put forth by Dr. Arden were sufficiently undermined on both cross-examination and through the testimony of Dr. Chirkov so that a reasonable jury would not conclude that the fall from the stairway by Delestre was the sole act resulting in the fatality of TJ. Not only did he disagree with Dr. Arden's version of events, but he said it was not possible.

C

Presentation of Evidence at the Post-Conviction Hearing

The High Court encourages the trial court to comment on the credibility of witnesses when practicable. *State v. Forbes*, 925 A.2d 929, 935 (R.I. 2007).

Mr. Donley was a well-known member of the criminal defense bar, having appeared in most of the state's criminal courts extensively, and accepted numerous court assignments from the Superior Court. Frankly, the Court also knew, pretrial, that Mr. Donley had decided to move to Italy permanently and then later returned. When he recommenced his criminal practice, Mr. Donley was convicted of bribery and obstruction wherein he coached a witness to lie before a Grand Jury. He received a sentence with years to serve (case number P1-2012-1281A). He was disbarred. The underlying case was heated and highly publicized. Attorneys are often defensive when former clients are left to criticize their representation in post-conviction cases. This case may have been different as Mr. Donley had little to lose in regard to his professional reputation, and he may be inclined to favor Bunnell recognizing her prison sentence was so substantial. The Court also recognized early on that Mr. Donley's testimony would be critical and, upon entering the courtroom, noticed his empathy for Bunnell, who was also present. While the Court does not recall them speaking with or sitting near one another, the Court continuously focused on Mr. Donley's appearance, manner of responding, and approach to discern his credibility, frankness, and whether his testimony was well-founded. While aware of these issues, the Court was always

focused on its principal responsibility of affording fairness and impartiality in conducting its proceedings and rendering a just decision.

During the extensive questioning by Bunnell's counsel, Mr. Donley appeared surprisingly composed. He was well-groomed, calm, thoughtful, and confident in his answers. He limited the scope of his recollection where appropriate (the Bunnell trial was five years before Mr. Donley testified), but he was thoughtful and courteous to all. The Court does not believe he was extensively prepared by either counsel, but he knew the significance of the proceeding and even the burden of proof. He had clearly considered the issues and his representation at Bunnell's trial prior to testifying but admitted to doing that after all of his criminal trials. Initially, he seemed that he would be defensive about his failure to enlist Dr. Arden, but as testimony continued, he acknowledged that he could have retained Dr. Arden and there would be little harm in doing so. Mr. Donley also admitted not objecting to Dr. Gillespie's testimony. He did not recall all that had been disclosed to him pretrial but was able to rationalize why he would be reluctant to call Dr. Arden, and his surprise that Dr. Gillespie seemed to magnify the harm by Bunnell. He testified that he gave his file to a new defense counsel for the sentencing proceedings, but oddly he found the notes concerning Dr. Arden later. This curiosity was never explained. Mr. Donley was stern on his contention that the law would prevent Bunnell from disclaiming responsibility for participating in a joint enterprise and was clear that he disagreed with the law on this issue.

Frankly, the Court does not find Mr. Donley credible on the issues of failing to call Dr. Arden and allowing Dr. Gillespie to testify without objection. Given Mr. Donley's extensive criminal law practice, he surely recognizes that strategic choices are difficult to challenge, and that those decisions would be the real nuts and bolts of the post-conviction challenge. During his testimony, Mr. Donley explained each of these decisions as tactical decisions, but he did not do it

well. For example, he never described the substantial risk to Bunnell in having competing experts question which acts Bunnell inflicted on TJ, describing to the jury again and again the horrific acts of that night (as was done during the nonjury post-conviction trial). He never indicated that allowing a substitute pathologist to testify could allow him more room to maneuver or infer confusion in the medical examiner's office. Instead, he provided tactical reasons, but the Court cannot conclude that those reasons alone were the basis of Mr. Donley's decision at trial. He also claims, now, that he should have objected to Dr. Gillespie's testimony when undisclosed evidence was brought in. Hr'g Tr. 24, Oct. 28, 2016. Mr. Donley stated, "I didn't know Gillespie at trial was going to say something that, in retrospect, I wished I had hired the expert for." *Id.* at 45. "[T]his was the first time I was burned by an expert witness that I had hoped to adopt the testimony of." *Id.* The Court is left to conclude that Mr. Donley was trying to boost his credibility or reputation but not admit that he dropped the ball completely, and left the door open for Bunnell's case.

When the cross-examination by the state began, Mr. Donley appeared more defensive. He gave longer answers so as to control the testimony. Shortly thereafter, he became more on point and responsive, though he was never helpful or friendly to the state's counsel. Overall, Mr. Donley's testimony was consistent, well-based, and not significantly disputed by the parties. No witness was called to dispute Mr. Donley's testimony.

Dr. Arden was articulate and qualified. He seemed relatively well prepared. He testified extensively in the past, and he had a written report which he was testifying consistent with. He was less convincing when he testified regarding Mr. Donley. He claimed that Mr. Donley's name "very vaguely rings a bell." Hr'g Tr. 49, Apr. 10, 2019. He believed they had one conversation. *Id.* He was clear that Mr. Donley did not hire him. Although the doctor spoke convincingly, it

was not credible that he was hearing Mr. Donley's name for the first time in twelve years or that he remembered a vague telephone call but distinctly recalled he was not retained. This gave the Court pause in considering his overall credibility. Dr. Arden was convinced that if he were given the same questions twelve years ago, he would have come to the same conclusion, even if he were not given the trial transcripts. *Id.* at 50. Not giving any foundation to how he would know what Delestre would testify pretrial, the Court finds this less than credible. This led the Court to question how Dr. Arden could have concluded that Delestre was alone in causing the head injuries, when Bunnell admits to causing head injuries and the babysitter described the events as one horrific act after another.[7]

During direct examination, the Court found Dr. Arden to be well-spoken, deliberative, and courteous. On cross, Dr. Arden was asked about a litany of injuries to TJ's head resulting in a number of substantial injuries. The doctor admitted there were injuries to the left cheek, left ear, temple, right ear, forehead, left eye, right eyebrow, cheekbone bite marks, and five bruises on his forehead of various sizes, leaving the factfinder to question how one injury by Delestre could be pinpointed as the cause of the death. Dr. Arden also admitted that TJ's brain was shifted within the skull and at least four vertebrae were fractured, without specifying why he excluded them as causes contributing to the death. In reviewing Delestre's testimony, Dr. Arden concluded that Delestre struck the child in the head when Bunnell had left, which caused the child to fall and flip down a half-flight of stairs, and the child was not awake or conscious thereafter. *Id.* at 37-38. The fracture of the femur in TJ's thigh would have caused extreme pain and prevented him from standing. Dr. Arden believed that Delestre's testimony that TJ attempted to walk up the stairs was

[7] Moreover, Dr. Arden had the benefit of knowing what had happened at trial, and perhaps with Mr. Donley's earlier testimony here. The benefit of hindsight is quite different from preparing an opinion in advance of trial or during a heated trial.

not consistent with his femur injury (or other evidence), therefore, the broken femur resulted from the fall down the stairs at the time of the head injury. *Id.* at 44-45.

On cross, Dr. Arden acknowledged that it would have taken a substantial blow to cause TJ to fall breaking the femur and would have had to have had numerous contacts with the half-flight of stairs. He acknowledged he could not specify the force required or be sure of how TJ fell on which steps. Dr. Arden was shown a case he was previously involved in during which he claimed it was unlikely that a child's subdural hemorrhage could result from a fall down five stairs. *Id.* at 74. Dr. Arden then declared that he was not an engineer or biomechanical practitioner. *Id.* at 76. He was asked about the babysitter's testimony when she said that before she left with Bunnell, Delestre had placed TJ on the steps, TJ was breathing heavy and letting all of his body weight fall on the floor, not trying to hold himself up.[8] Hence, the Court was left with little credible evidence to establish that the brain injury resulted from TJ's fall on the stairs. Dr. Arden avoided answering whether the fracture may have been displaced at a later time, and generally gave longer, non-responsive answers through the rest of the cross-examination. He acknowledged, but did not distinguish, the significance of the other substantial injuries and multiple head injuries. He was asked about compression fractures to the vertebrae, blood loss from fractures, and shock. He struggled to describe the force of the fall after the throw compared to the force from a fall down the stairs, proceeding to longer, non-responsive answers.

Dr. Arden presumed that the witnesses were in agreement that TJ was walking when Bunnell left to take the babysitter home. The Court is not convinced that the babysitter testified

[8] Dr. Arden's written report, as well as his testimony, incorrectly presumes that the babysitter testified that TJ walked up the stairs.

to that. Instead, she said that she saw Bunnell strike TJ in the head quite hard, that TJ was breathing heavy, and Delestre was carrying him up the stairs.

Dr. Chirkov was then called as a defense witness. He is a medical doctor, a forensic pathologist and a medical examiner in the R.I. Chief Medical Examiner's Office. He has served as the acting chief for two years. He has performed over 5000 autopsies and testified over 150 times. He also has a Ph.D. in biophysics, which allowed him to testify concerning the amount of force which would need to be applied at certain directions to damage the specific bone. He opined that TJ's height, weight, bone density, the layout and height of the stairs, and the description of the fall could not have caused the fracture. Hr'g Tr. 131-32, Apr. 10, 2019. The doctor's unrefuted description of contrecoup, his distinguishing the different levels of consciousness, the examination of the brain edema, and use of photographs of TJ showing specific injuries all substantiated his conclusion that the various injuries (ten impacts to the head), subdural and subarachnoid hemorrhages, contradicts Dr. Arden's conclusion that one injury must have caused the death. *Id.* at 133-45. Dr. Chirkov concluded, "We have multiple injuries which result in this." *Id.* at 146. He confirmed that Dr. Latuszynski was correct in including both the femur fracture and the brain injury as causes of death.

Dr. Chirkov was very difficult to understand at first because of his heavy Russian (or Eastern European) accent. The Court and the stenographer[9] often asked him to repeat certain words. However, he made up for this deficiency by speaking slowly and deliberately. Clearly, he understood English well and communicated in English well, but for his accent. His sentences were precisely phrased. He was careful to clarify definitions of some terms which may not have the same meaning in the medical world as in the everyday world. For example, he specified different

[9] The Court compliments the stenographer for her patience and focus with this testimony.

levels of consciousness and inquired of the word "ambulatory." He spoke logically and could easily point to other findings which gave the basis for his conclusions. He was formal and comfortable on the witness stand, troubled only by the limited ability of others to understand him easily. The Court found him very credible.

On cross-examination, Dr. Chirkov discounted Dr. Arden's claim that Delestre's backhand to TJ's forehead caused TJ to fall and rendered him unconscious. Dr. Chirkov found no corresponding injury to the neck which would have resulted from such a powerful fall on the stairs. He refused to believe that the same fall on the staircase caused the femur to break, as the femur needed great vertical force to break, and the evidence demonstrated tumbling down several steps. He could not conclude that Delestre's throwing TJ through the air caused the femur fracture, as there is insufficient evidence to conclude that, noting the need for the force must be vertical to the bone. This continued through cross-examination, as hypotheticals were asked of Dr. Chirkov, but he rejected the hypotheticals as they were flatly contradicted by evidence. The cross-examination ended with Dr. Chirkov describing, through applications of laws of physics, that there were insufficient forces on TJ at different times to suffer the fatal injuries when they were claimed. In this respect, Dr. Chirkov's qualifications in biophysics significantly harmed Dr. Arden's hypothesis.

On cross it was discovered that Dr. Chirkov was involved in discussions with Dr. Latuszynski at the time of this autopsy and trial. Nevertheless, no inconsistencies or collusion between the two were evident. On cross, Dr. Chirkov was not easily led, instead politely saying, "I disagree with the statement." *Id.* at 162.

The Court found Dr. Chirkov to be highly credible. He was careful to base his conclusions on the evidence shown and backed them up with thorough reasoning, photographic evidence, and

quick references to evidence submitted at trial. He was cordial, although he would not easily adopt the presumptions given by defense counsel for hypothetical questions. Not only was he consistent, but the factfinder came away with the conclusion that his analysis was thorough, reasonable, and logical.

II

Standard of Review

Under § 10-9.1-1, "one who has been convicted of a crime may seek collateral review of that conviction based on alleged violations of his or her constitutional rights." *Lynch v. State*, 13 A.3d 603, 605 (R.I. 2011). Therefore, "one who alleges the infringement of his or her constitutional Sixth Amendment right to the assistance of counsel may avail his or herself of the postconviction-relief process." *Rice v. State*, 38 A.3d 9, 16 (R.I. 2012) (citing *Brown v. State*, 964 A.2d 516, 526 (R.I. 2009)). The post-conviction relief applicant "bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011) (quoting *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011) (quoting *Mattatall v. State*, 947 A.2d 896, 901 n.7 (R.I. 2008))).

III

Issues Raised in Petition

Bunnell believes that her attorney, Mr. Donley, provided ineffective assistance to her at trial by not calling Dr. Arden as an expert witness. She contends that Dr. Arden's testimony that Delestre made the fatal blow by hitting TJ and causing him to fall down the stairs, would have resulted in a different outcome for her case.

IV

Analysis

A

Ineffective Assistance of Counsel

The Court notes that "a strong presumption exists that an attorney's performance falls within the range of reasonable professional assistance and sound strategy, creating a heavy burden for a party to establish constitutionally ineffective representation." *Ouimette v. State*, 785 A.2d 1132, 1138-39 (R.I. 2001) (citing *Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995)). In addressing the question of ineffective assistance of counsel, this Court applies the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Lynch*, 13 A.3d at 605. The Court must first determine whether counsel's performance was deficient, finding that "it fell below an objective standard of reasonableness." *Id.* This Court then examines the deficient performance and the applicant must prove "by a 'probability sufficient to undermine confidence in the outcome[,]' that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 605-06 (quoting *Strickland*, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Reyes v. State*, 141 A.3d 644, 655 (R.I. 2016) (quoting *Strickland*, 466 U.S. at 694).

1

Alleged Deficient Performance of Counsel

This Court is required to examine the attorney's conduct without the benefit of hindsight "'and to evaluate the conduct from counsel's perspective at the time.'" *Lynch*, 13 A.3d at 606 (quoting *Strickland*, 466 U.S. at 689). Therefore, the Court views the attorney's performance in a highly deferential light. *Id.* (citing *Washington v. State*, 989 A.2d 94, 99 (R.I. 2010)). "'It is well

established that tactical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel."' *Id.* (quoting *Vorgvongsa v. State*, 785 A.2d 542, 549 (R.I. 2001)); *see Rice*, 38 A.3d at 17 (finding that the trial counsel's decision to not call a medical expert who would have substantially the same testimony as other witnesses was tactical and not unreasonable in light of the circumstances); *Young v. State*, 877 A.2d 625, 629 (R.I. 2005) (finding that the trial attorney's tactical decision to not call two witnesses to contradict the victim was reasonable when the attorney believed he could more effectively draw out inconsistencies on cross-examination of the victim); *Powers v. State*, 734 A.2d 508, 522 (R.I. 1999) (finding that the trial attorney carefully considered whether to use a ballistic expert before determining not to, and it was a tactical decision to employ a different defense strategy instead). The Court notes that under this standard, '"effective representation is not the same as errorless representation."' *Rice*, 38 A.3d at 18 (quoting *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978))).

Bunnell argues that Mr. Donley testified that there was no harm in asking for an expert opinion, but there may have been some benefit. Hr'g Tr. 30-31, Oct. 28, 2016. She compares his performance to those of the attorneys in *Powers* and *Rice*, arguing that Mr. Donley did not carefully consider the use of an expert as those attorneys did.

Here, Mr. Donley had determined that based on his knowledge of conspiracy law, Bunnell would be responsible for TJ's murder whether or not she committed the fatal blow. *Id.* at 15-16 (Mr. Donley stating that he did not think hiring an expert would be fruitful to determine "what I thought was the primary conduct that caused the injuries" because "it's a joint enterprise"); *Id.* at 14-16, 28 (although Mr. Donley believed the acts could be separated and reached out to Dr. Arden due to this belief, he ultimately determined "that the criminal liability law that [he] understood at

the time led [him] to conclude that some distinction between the parties' acts or what injuries were inflicted, even if it could be established, weren't necessarily going to lead to any legal benefit"). Thus, Mr. Donley made the decision that challenging the state's expert witness and the babysitter on cross-examination would benefit Bunnell more than calling an additional witness. *See Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993) (finding that the court "will not adopt a constitutional rule that counsel is ineffective if he relies on the professional opinion of a coroner in formulating defense strategy, rather than hiring an independent expert"). This defense would allow Mr. Donley to minimize Bunnell's participation in the acts. Hr'g Tr. 33, Oct. 28, 2016 (Mr. Donley agreeing that the theory of defense was "what Katherine Bunnell did to TJ before she left and then as a separate crime was the actions of Gilbert Delestre, who delivered the blows that were fatal to TJ when Katherine wasn't there.") Further, calling another witness to describe the extensive injuries TJ endured at the hands of Bunnell may have further damaged her case with the jury, rather than help it. Therefore, Mr. Donley made an objectively reasonable tactical decision in not pursuing testimony from Dr. Arden.[10] That is, Mr. Donley would not refute the testimony from the medical examiner but use the state's witness "productively at trial" (*id.* at 23), using what he needed from Dr. Latuszynski's words.

Bunnell also points to a number of cases outside of this jurisdiction where post-conviction relief was granted as being similar to the case at hand; however, those cases are distinguishable. In *Weddell v. Weber*, the United States District Court for the District of South Dakota granted federal *habeas* relief when a trial counsel failed to retain an expert to rebut testimony regarding the victim's cause of death. 290 F. Supp. 2d 1011 (D.S.D. 2003). There, the state's expert testified

[10] As discussed previously, the Court did not find Mr. Donley credible in his statements that failing to hire Dr. Arden was a mistake and not tactical.

that the most serious of the blows was delivered with an item like a car jack. *Id.* at 1020. Although defendant's trial counsel could have called an expert to testify that the most serious blow was the fatal blow, after the state's expert testified that it could have been the fatal blow, trial counsel failed to do so. *Id.* The state's expert testimony differs greatly here. Dr. Gillespie testified that after examining the autopsy report, he determined that all of the blows together led to TJ's death, and could not identify a single injury as the "most serious" or say how that injury, with particularity, was caused. Therefore, Mr. Donley's decision to instead work with the testimony provided by Dr. Gillespie was reasonable.

On the other hand, Bunnell fails to recognize other similarities between that case and the one at present that harm her argument. In *Weddell*, the court determined that the testimony did not substantially change from the autopsy report to the testimony at trial. *Id.* at 1019. This Court finds the same to be true here. Although Dr. Latuszynski testified that the cumulative effects of the injuries were fatal but that the child would have rapidly lost consciousness after the fatal blow, and Dr. Gillespie testified that Bunnell's actions towards TJ could have been fatal and that the fatal blow may not have caused immediate unconsciousness, these differences did not affect the tactical decisions of Mr. Donley. Hr'g Tr. 17, Oct. 28, 2016. If anything, the change to Dr. Gillespie as the testifying expert would have given Mr. Donley more of a reason to rely on the cross-examination, as Dr. Gillespie was a further step removed from the process and likely would be easier to cross-examine. Further, Dr. Latuszynski's report was included as evidence at trial.

Bunnell also points to *Sena v. Spencer*, an unpublished case from the District Court for the District of Massachusetts. No. Civ. A. 05-10381-DPW, 2006 WL 568306 (D. Mass. Mar. 8, 2006). There, the *habeas* petitioner argued that his counsel was ineffective for failing to call a firearms or wounds expert to support a theory that petitioner had merely meant to hit the murder victim with

a gun and not shoot him. *Id.*, at *3. However, that case had a factual anomaly; petitioner focused on attorney's failure to call an expert at petitioner's second trial when that very same attorney had argued on appeal in the first trial that petitioner's first counsel had acted ineffectively by not calling an expert. *Id.*, at *6. Therefore, the attorney could not articulate any reason why he decided not to hire an expert for the trial. *Id.* No such anomaly exists before this Court, and the Court has already articulated a number of reasons, described by Mr. Donley, that caused him to reasonably decide not to call Dr. Arden.

Lastly, Bunnell points to *Dugas v. Coplan*, where the First Circuit found that the failure to investigate the use of an expert rose to the level of ineffective assistance. 428 F.3d 317 (1st Cir. 2005). In that case, the trial attorney determined that there may be a defense in arguing that the fire at issue was not arson. *Id.* at 323. Although the attorney believed this was a valid theory, he instead focused all of his attention on a different theory, without any justifiable reason. *Id.* at 325. This is, again, easily distinguishable from the case at hand. Mr. Donley considered bringing forth expert testimony about which act was the "fatal blow"; however, Mr. Donley determined that any such testimony would not be helpful in light of conspiracy law. Thus, Mr. Donley had reason not to investigate the expert testimony further. This decision was reasonable in light of the circumstances at the time.

Therefore, this Court finds that Mr. Donley's assistance of counsel was not deficient in not calling Dr. Arden as an expert witness. Therefore, Bunnell's ineffective assistance of counsel claim must fail.

2

Prejudice of Attorney's Conduct

Even if the Court were to find Mr. Donley was deficient in his assistance as counsel to Bunnell, the Court must still find that such ineffective assistance prejudiced Bunnell. Thus, here, Bunnell must show that had Mr. Donley acted differently there is a reasonable likelihood of a different result in her case. Bunnell must prove this with "a 'probability sufficient to undermine confidence in the outcome.'" *Lynch*, 13 A.3d at 605 (quoting *Strickland*, 466 U.S. at 694). The Court assumes (without deciding) that Dr. Arden was available to testify at trial, though we are left with scant notes and memories of Mr. Donley's original communications with Dr. Arden, and although it took two-and-a-half years for him to be available to testify at the post-conviction hearing. This Court also assumes, without deciding, that Dr. Arden's testimony was admissible.[11]

At the post-conviction hearing, Dr. Arden testified that he would have testified at Bunnell's trial that he believed the fatal blow would have caused rapid unconsciousness for TJ, and therefore, the fall on the stairs must have been the cause of this injury. Hr'g Tr. 39-40, Apr. 10, 2019 (He testified that "those impacts that caused the fatal injuries occurred in the incident that [Delestre] described when they were trying to walk up the stairs and he, as he said backhanded the child in the head and the child fell, flipping down the roughly half a flight of stairs."). Dr. Arden also

[11] "It is for the trial justice, based on the particular facts and circumstances of the case before him, to determine whether a medical examiner has relied too heavily on witness statements such that the testimony amounts to an impermissible comment on the witness's credibility." *State v. Roscoe*, 198 A.3d 1232, 1243 (R.I. 2019). The Court notes here that although Dr. Arden heavily relied upon Delestre's testimony regarding the fall down the stairs to the exclusion of others, Delestre was not the only witness to this occurrence. *Id.* (finding that "medical examiners do not conduct their examinations in a vacuum"). The Court also notes that Dr. Chirkov considered other testimony at trial as well as the autopsy report.

believed the fall down the stairs was the cause of TJ's broken femur because the boy could not have been standing or walking with such a break and would have been in great pain. *Id.* at 44.

Dr. Arden also relied heavily on Delestre's testimony in coming to his conclusions regarding the extent of the injuries caused by Delestre that led TJ to fall down the stairs. *Id.* at 57 (Dr. Arden stating that he was "relying on the account of Delestre" in determining how TJ was "twisting or flipping" when he fell down the stairs.). However, Delestre's credibility as a witness is questionable and contradicts the babysitter's recollection, who said TJ was carried and looked unable to support his weight when she left the home with Bunnell. Dr. Arden admitted that the babysitter's testimony left open the possibility that TJ was not putting weight on his broken femur before she left. *Id.* at 85-87. Therefore, Dr. Arden's reliance on TJ walking up the stairs before being backhanded rests upon a questionable presumption. When Dr. Arden was questioned thoroughly about the injuries and how substantial the blow would have had to have been for TJ to be so significantly injured, Dr. Arden had difficulty answering. *Id.* at 96-97.[12]

Although Bunnell focuses here on Dr. Arden's testimony that TJ would have rapidly lost consciousness after the fatal blow, Dr. Latuszynski, who performed the autopsy, was of the same opinion. Although Dr. Gillespie may have disagreed at trial, Dr. Latuszynski's report was still admitted into evidence and the jury was able to see this medical opinion.

Bunnell attempts to argue that anything Dr. Chirkov testified to is irrelevant because the Court only looks to Dr. Arden's testimony and if that alone would have changed the outcome of the trial. However, Bunnell ignores Dr. Chirkov's availability at that time as a Rhode Island Medical Examiner who could have been called to rebut Dr. Arden's testimony on body

[12] The state successfully discredited Dr. Arden's testimony at hearing after a methodical but vigorous cross-examination. It is likely that Dr. Arden would have undergone a similar cross-examination if he testified at trial.

movements. Dr. Chirkov was working on the medical examiner's staff and familiar with the Bunnell investigation at the time of trial. He was readily available to testify on rebuttal if Dr. Arden strayed into testimony on the mechanics of movements, as he did at hearing. Further, the Court can use Dr. Chirkov's testimony to determine the credibility of Dr. Arden and how that may have affected his testimony and presentation to the jury at trial. Dr. Chirkov's testimony was insightful here. Unlike Dr. Arden, Dr. Chirkov is a biophysicist and was able to discuss the mechanics of and the perpendicular force required for TJ to break his femur under these circumstances. Hr'g Tr. 129-30, Apr. 10, 2019. Dr. Chirkov's conclusions seriously bring into question whether Dr. Arden's opinions are reliable, and a jury would likely question Dr. Arden's credibility.

Lastly, if Dr. Arden testified, the trial likely would have focused on how much harm Bunnell caused. Mr. Donley likely hoped to avoid such a focus when thinking about the degree of homicide the jury may find and the sentence to be imposed by the trial justice. Ultimately, Mr. Donley's defense was somewhat successful; the state was seeking life without parole for Bunnell; however, Bunnell was convicted of only second-degree murder, taking such a significant sentence off the table.

For all of these reasons, this Court cannot conclude that Dr. Arden's testimony would have changed Bunnell's case with a probability sufficient to undermine confidence in the outcome. *Lynch*, 13 A.3d at 605 (quoting *Strickland*, 466 U.S. at 694). Therefore, this Court finds that although it does not believe that Mr. Donley's assistance of counsel was deficient in not calling Dr. Arden as an expert witness; even if it was, this conduct did not prejudice Bunnell. Therefore, Bunnell's ineffective assistance of counsel claim must fail.

V

Conclusion

For the foregoing reasons, this Court finds that Mr. Donley's assistance at trial was not deficient and, even if any conduct was deficient, that conduct did not prejudice Bunnell. Therefore, Bunnell cannot succeed on her ineffective assistance of counsel claim. Accordingly, Bunnell's Application for Post-Conviction Relief is denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Katherine Bunnell v. State of Rhode Island**
CASE NO:	**PM-2012-4062** **(P1-2005-0161A)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 5, 2020**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**James T. McCormick, Esq.**
For Defendant:	**Jeanine P. McConaghy, Esq.** **John E. Corrigan, Esq.**